

not dispute the formation of the partnership and the payment of money by Tsen Tuan. In his affidavit dated November 30, 1976 in paragraph 3 Sim Teck Kui affirmed (see page 47 of Federal Court Civil Appeal No. K.1 of 1977) as follows:

"(3) I crave leave to refer to the judgment in High Court Civil Suit No. K.200 of 1970 dated October 4, 1976 which is related to the present case in which the learned judge found as a fact that M\$120,000 of the total purchase price for the shares in Shin Chong Sawmill Sdn. Bhd., was paid with the tenth defendants' capital fund and that the balance in the sum of M\$60,000 was raised by the plaintiff from various persons. That does not necessarily mean that the plaintiff is entitled to one third of the shares in Shin Chong Sawmill Sdn. Bhd."

Reference was also made to the Civil Suit No. K.200 of 1970 in paragraph 10 of the defence of the shareholders which was stated earlier on. Further, counsel for defendants in his address (see page 57 of Federal Court Civil Appeal No. K.1 of 1977) clearly submitted that certain findings of facts in Civil Suit No. K.200 of 1970 which are relevant to this suit might be adopted. In fact, in applying for amendment to paragraph 10 of the defence of the shareholders, counsel also referred to the finding in Civil Suit No. K.200 of 1970 that plaintiff was not the agent of Tsen Tuan and Chai Hsiun Ying and stated categorically that he was relying on the record of proceedings in that civil suit. (See page 54 of Federal Court Civil Appeal No. 2 of 1977).

The 10th defendant was never a party to the sale and purchase agreement dated September 25, 1969 which was between plaintiff and the shareholders and executed before the existence of the partnership agreement. The matter would have been less complicated if the 10th defendant was also made a plaintiff in Civil Suit No. K.200 of 1970 for then whoever has the right to the shares of SCS can be decided upon. In the exercise of his discretion the learned judge has decided to allow 10th defendant to intervene and to invoke clause 8 of the partnership agreement. This is yet another matter which will have to be decided in the pending suit. The question of partnership was never raised by the shareholders. In view of his finding that plaintiff was not the trustee and agent of Tsen Tuan and Chai Hsiun Ying, and the pleadings of the shareholders, the learned judge was, with respect, right to hold that paragraph 10 of the defence of the shareholders could not stand. In the circumstances, I cannot say he was wrong to refuse amendments to the said paragraph on the ground that it was not *bona fide* but merely to delay the fair trial of the pending suit. I would order an early trial of the suit.

For reasons given, I would dismiss the appeal. Costs in the cause.

**Ong Hock Sim F.J. and Yusoff J. concurred.**

Solicitors: *Yong & Co.; Ee & Lim.*

## LLOYD TRIESTINO SOCIETA v. CHOCOLATE PRODUCTS (MALAYSIA) SDN. BHD.

[F.C. (Ong Hock Sim, Raja Azlan Shah and Chang Min Tat F.J.) December 9, 1977 and January 10, 1978]  
[Penang — Federal Court Civil Appeal No. 161 of 1977]

*Practice and Procedure — Renewal of Writ — Application made before expiry of twelve months from issue of writ — Reasons for renewal — R.S.C. 1957, O. 8 r. 1.*

The respondent had taken out a writ against the appellant but the writ had not been served within twelve months of the issue. Before the expiry of the twelve months period the respondents applied *ex parte* for renewal of the writ and an order for renewal was made. The appellants applied to set aside the order for renewal and the service of the writ but this application was dismissed by the Senior Assistant Registrar whose decision was upheld on appeal in the High Court. The appellant appealed.

**Held**, allowing the appeal: (1) the court had jurisdiction to renew the writ in this case but even if the application is made within twelve months of the date of issue the jurisdiction should not be exercised in all cases and indiscriminately but only where there are good reasons to excuse the delay in service;

(2) in this case no reason had been advanced for the exercise of the court's discretion in renewing the writ and the discretion ought not to have been exercised.

*Cases referred to:-*

- (1) *Hume v. Somerten* (1890) 25 Q.B.D. 239.
- (2) *Doyle v. Kaufman* (1877) 3 Q.B.D. 7.
- (3) *Hewlett v. Barr* [1891] 1 Q.B. 98.
- (4) *Sheldon v. Brown Bayley's Steel Works Ltd. and Dawnays Ltd.* (1853) 2 Q.B. 392.
- (5) *Battersby & Ors. v. Anglo-American Oil Co. Ltd. & Ors.* [1945] 1 K.B. 23.
- (6) *The Espanoleto* [1920] P. 223.
- (7) *Firm of T.A.R. CT. v. Firm of S.N.S. SR.N.* [1954] M.L.J. 72 C.A.
- (8) *E. Ltd. v. C. & Anor.* [1959] 1 W.L.R. 692.
- (9) *Smalpage v. Tonge* (1886) 17 Q.B.D. 644.
- (10) *Holman v. George Elliot & Co. Ltd.* [1944] K.B. 591.
- (11) *New Ching Kee v. Lim Ser Hock* [1975] 2 M.L.J. 183.

FEDERAL COURT.

*Lim Kean Chye* for the appellants.

*Charles Ong* for the respondents.

**Chang Min Tat F.J.** (delivering the judgment of the Court): This appeal clearly involves the proper construction and application of Order 8 rule 1 Rules of the Supreme Court. In its pertinent parts, it reads as follows:

"1. No original writ of summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of the twelve months, apply to the court or a judge for leave to renew the writ; and the court or judge, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reasons, may order that the original or concurrent writ of summons be renewed for six months from the date of such renewal inclusive, and so from time to time during the currency of the renewed writ... and a writ of summons so renewed shall remain in force and be available to prevent the operation of any written law, whereby the time for the commencement of the action may be limited, and for all other purposes from the date of the issuing of the original writ of summons."

As has been observed in *Hume v. Somerton*,<sup>(1)</sup> this Order is a complete code on the subject.

The life of a writ of summons is 12 months, unless served within this period or if not served, renewed. For the purpose of renewal, the plaintiff must satisfy the requirements set on him by this rule. He must first apply during the currency of the writ, that is before the expiration of the year, including the day of the issue of the writ. If he does so, he must also give good reasons for the failure to serve the writ within the pendency of its life.

The writ of summons taken out by the respondents as plaintiffs in this case was not served on the named defendants within 12 months of the issue. But a scant fortnight before the end of this period of 12 months, the respondents applied *ex parte* for renewal of the writ. The order was made on the day before the writ expired. On being served with the writ and the order for its renewal, the appellants applied by summons in chambers to set aside the service and the order for the renewal on the grounds that "service of the writ is barred by limitation" and that renewal of the writ was not made for good reason. There was a further application in the alternative for stay, which in the light of the decision of this court, we need not deal with. The application to set aside was heard by the Senior Assistant Registrar who dismissed it and whose decision was upheld by the learned judge in Penang.

From that decision the appellants appeal to this court.

It is obvious that though the first ground was stated to be that service was barred by limitation, what was contended was that renewal of the writ would revive a cause of action that would otherwise have been barred. The cause of action, in this claim for breach of contract and for negligence in the carriage or custody of goods in a ship, accrued on November 3, 1973 and would be barred one year later. On October 31, 1974, the respondents caused the writ to be issued, and on October 17, 1975, filed the summons in chambers for renewal. The order was made on October 30, 1975, that is, one day before its life had run out. The cause of action which would have become statute-barred on November 3, 1974, was kept alive by the writ and after October 30, 1975, by the order to renew the writ. The obvious complaint of the appellants was therefore the order for renewal had revived or kept alive a cause of action that would have become statute-barred but for it, and that was to deprive them of a defence that would otherwise have been available to them.

The note in the 1963 *Annual Practice* at page 92 reads:

"Although the court has power to enlarge the time under Order 64 rule 7, the practice is not to do so after the expiration of twelve months from the date of the writ, or of six months from the date of the last renewal, where, but for such enlargement of time, the plaintiff's claim would be barred."

*Mallal's* Supreme Court Practice (4th Edn.) at page 57 carries a note to the same effect:

"The court ought not to exercise its discretion to renew a writ when the renewal would deprive a defendant of the benefit of the plea of limitation which had accrued."

With respect, the note in *Mallal's* is perhaps not as precise as that in the White Book.

A The case law mentioned to both in the White Book and in *Mallal's* referred to applications for renewal after expiry of the writ. *Doyle v. Kaufman*,<sup>(2)</sup> *Hewlett v. Barr*,<sup>(3)</sup> *Sheldon v. Brown Bayley's Steel Works Ltd. & Dawnays Ltd.*,<sup>(4)</sup> *Battersby & Ors. v. Anglo-American Oil Co. Ltd. & Ors.*<sup>(5)</sup> and *The Espanoleto*<sup>(6)</sup> are all cases in which applications to renew the writ were made after the 12 months period of its pendency.

B *Firm of T.A.R.C.T. v. Firm of S.N.S.S.R.N.*<sup>(7)</sup> is another such case, as is *E. Ltd. v. C. & Anor.*,<sup>(8)</sup> cited in *Mallal's*.

C The common factor in all these cases that at the application for renewal the writ had expired, time had started to run again and had run out as against the applicant and in favour of the defendant, means, with respect and in our view, that the benefit of the defence of limitation had become available to the defence. In this circumstance, the court did not normally renew the writ, unless for some reasons such as the case of a concurrent writ where the writ of summons had been renewed, *Smalpage v. Tonge*,<sup>(9)</sup> or the relative unawareness of section 8 Maritime Convention Act, *The Espanoleto, supra*, or unless the court can regard the omission as procedural as in *Holman v. George Elloit & Co. Ltd.*<sup>(10)</sup>

D But when the application was made during the life of the writ, the same objection could not prevail, as limitation had not become operative.

E The learned judge thought that since the application for renewal was made before the expiry of the limitation period, the defence of limitation had not arisen. With respect, we agree, but we would add that the jurisdiction of the court to enlarge the time, even if the application is made within 12 months of the date of issue, is not to be exercised in all cases and indiscriminately. We agree, with respect, with Lord Goddard L.J. (as he then was) in *Battersby & Ors. v. Anglo-American Oil Co. Ltd. & Ors.*, *supra*, at pages 32-33 that

F "... even when an application for renewal of a writ is made within twelve months of the date of issue, the jurisdiction given by the rule ought to be exercised with caution. It is the duty of a plaintiff who issues a writ to serve it promptly, and renewal is certainly not to be granted as of course on an application which is necessarily made *ex parte*. In every case care should be taken to see that the renewal will not prejudice any right of defence then existing, and in any case it should only be granted where the court is satisfied that good reasons appear to excuse the delay in service, as, indeed, is laid down in the order. The best reason, of course, would be that the defendant has been avoiding service, or that his address is unknown, and there may well be others, but ordinarily it is not a good reason that the plaintiff desires to hold up the proceedings while some other case is tried or to await some future development. It is for the court and not for one of the litigants to decide whether there should be a stay, and it is not right that people should be left in ignorance that proceedings have been taken against them if they are here to be served. While a defendant who is served with a renewed writ can, no doubt, apply for it to be set aside on the ground that there was no good reason for the renewal, his application may very possibly come before a master or judge other than the one who made the order and who will not necessarily know the grounds on which the discretion was exercised."

G On the question of whether the respondents had advanced good grounds to merit the exercise of the court's discretion in their favour, the learned judge

after citing this paragraph from the affidavit of Mr. Charles Ong, the respondents' solicitor, that

"Pending the outcome of the action against the sellers the writ herein was filed to preserve the plaintiff's claim against the carriers of the hazel nuts, so that the limitation period would not operate to bar the plaintiff's claim against the carriers,"

thought, against the contention of the appellants that he had no reason to disagree with the Senior Assistant Registrar's acceptance of it as a good reason.

Since the Senior Assistant Registrar had not stated in writing his grounds for renewing the writ, we are unable to ascertain that he had considered the question of or the necessity for good grounds and if he had, what he had regarded as good grounds. But the learned judge, accepting the excuse advanced by Mr. Charles Ong, thought the necessity to preserve the claim a good ground. With the greatest of respect, he was mistaking the wish for the deed. If time had to be stopped running, by the issue of the writ, surely the easiest way to continue to stop time from running and thus preserve the right of action, would be to serve the writ within the 12 months of its life. There might be in some cases difficulties in effecting service. Such difficulties could amount in the circumstances to good reasons. But this was not a case of any difficulty in effecting service. Mr. Charles Ong at the hearing of the appeal advanced a further reason when in answer to a question by the court he advised that the reason for failing to serve was that the parties were negotiating. If he was in contact with the other party or with the solicitors of the other party, there would not be the slightest difficulty in effecting service. Of course, he wanted to preserve the cause of action but he did absolutely nothing to do so. He had failed to keep his powder dry and if his gun misfired, he had only himself to blame.

In our view, the respondents had not advanced a single reason, much less a single good reason for the exercise of the court's discretion in renewing the writ and the discretion ought not therefore to be exercised. We agree with the approach in *New Ching Kee v. Lim Ser Hock*<sup>(11)</sup> and we accordingly allowed the appeal with costs here and in the court below and ordered that the application to renew the writ be dismissed.

*Appeal allowed.*

Solicitors: *Kean Chye & Sivalingam; Jayaraman, Ong & Co.*

## LOH KOON MOY & ANOR. v. ZAIBUN SA BINTI SYED AHMAD

[F.C. (Ong Hock Sim, Raja Azlan Shah & Chang Min Tat F.J.)  
December 3, 1977 and February 18, 1978]

[Alor Star — Federal Court Civil Appeal No. 54 of 1976]

*Land law — Agreement to sell land — Specific performance — Damages — Specific Relief Act (Act 137), s. 11(2).*

*Evidence — Oral agreement varying written agreement — Whether admissible — Evidence Act, 1950, s. 92.*

*Practice and Procedure — Failure to show representative capacity of defendant in endorsement on writ — Whether this makes action incompetent — Curable irregularity — R.S.C. 1957, O. 3 r. 4, O. 70 r. 1.*

In this case the first appellant had agreed to buy a piece of land from the respondent, the administratrix of an estate. An order of court had been given empowering the respondent to sell the land. The learned trial judge found in favour of the appellant but found that there was an oral agreement enabling the respondent to pay damages for breach. He therefore gave damages in favour of the appellant. The appellant appealed, seeking specific performance of the agreement.

**Held:** (1) there is a presumption in favour of specific performance of a contract to sell land and the respondent had not rebutted this presumption. There were therefore no grounds for the exercise by the learned trial judge of his discretion to give damages in lieu of specific performance;

(2) apart from the question of admissibility of the alleged oral agreement under section 92 of the Evidence Act, there was no consensus as to the terms of the agreement and the learned trial judge was not justified in accepting the evidence of the respondent on this point, when he had all along disbelieved the respondent and her witnesses;

(3) although the representative capacity of the respondent should have been shown in the endorsement on the writ, the omission to do so did not make the action incompetent. It was an irregularity which could be cured.

*Case referred to:-*

(1) *Oxford & Ors. v. Provan & Anor.* (1868) L.R. 2 P.C. 135.

FEDERAL COURT.

*S. Jeya Palan* for the appellants.

*Lim Kean Chye* for the respondent.

**Chang Min Tat F.J.** (delivering the judgment of the Court): This appeal is from the refusal of the learned judge to order specific performance of an agreement to sell land and his decision to award damages instead.

The agreement was in writing made on December 11, 1973, and was made between the respondent and the first appellant. The recital described the respondent thus "... the vendor herself and as administratrix is the owner" of the lands agreed to be sold. The agreed price was \$1100 per relong nett. A deposit of \$5000 was agreed to be made on the signing of the agreement and the balance was to be paid within one month from the date of the agreement. Time was not made of the essence. The purchaser was to be entitled to vacant possession.

The word "herself" is curious. But from the fact that the purchaser was also said to be acting for herself and as purchaser, it is possibly tautologous and without any significant meaning.

This agreement (Exhibit P1 which appears in pp. 99-100 of the Record of Appeal) is the one sued on.